S T A T E O F M I C H I G A N

C O U R T O F A P P E A L S

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED September 28, 2006
v	No. 260698 Oakland Circuit Court
MELVIN DARNELL ANDERSON, Defendant-Appellant.	LC No. 2004-197904-FH

Before: Cavanagh, P.J., and Markey and Meter, JJ.

PER CURIAM.

Defendant was convicted by a jury of two counts of possession with intent to deliver 50 or more but less than 450 grams of cocaine, MCL 333.7401(2)(a)(iii), two counts of possession of a firearm during the commission of a felony, second offense, MCL 750.227b, and one count of felon in possession of a firearm, MCL 750.224f. He was sentenced as an habitual offender, third offense, MCL 769.11, to concurrent prison terms of twelve to forty years each for the drug convictions and two to ten years for the felon-in-possession conviction, to be served consecutively to two concurrent five-year terms of imprisonment for the felony-firearm convictions. Defendant appeals as of right. We affirm.

Defendant's convictions arose from the discovery of cocaine on defendant's person and inside a residence in Pontiac during the execution of a search warrant. A handgun was also found inside the residence.

Defendant argues that the trial court erred in denying his motion to suppress cocaine that was recovered from his coat pocket when the police stopped him near the residence before executing the search warrant.

"A trial court's findings of fact in a suppression hearing are reviewed for clear error; but its ultimate decision on a motion to suppress is reviewed de novo." *People v Dunbar*, 264 Mich App 240, 243; 690 NW2d 476 (2004). Thus, this Court reviews de novo whether the Fourth Amendment was violated and if an exclusionary rule applies. *People v Fletcher*, 260 Mich App 531, 546; 679 NW2d 127 (2004).

It is undisputed that the police were executing a search warrant when they stopped defendant. In *Michigan v Summers*, 452 US 692, 705; 101 S Ct 2587; 69 L Ed 2d 340 (1981), the Supreme Court held that "a warrant to search for contraband founded on probable cause implicitly carries with it the limited authority to detain the occupants of the premises while a

proper search is conducted" (footnote omitted). In *United States v Cochran*, 939 F2d 337, 339 (CA 6, 1991), the Sixth Circuit Court of Appeals found that the detention of a defendant was justified under *Summers* where the defendant was stopped after driving a short distance from his home. The court explained:

> Defendant does not dispute the holding in *Summers*, but attempts to factually distinguish it from the instant case. In *Summers*, police stopped the individual as he was "descending the front steps." In contrast here, police stopped defendant after he had driven a short distance from his home. We do not find this distinction significant, however. *Summers* does not impose upon police a duty based on geographic proximity (i.e., defendant must be detained while still on his premises); rather, the focus is upon police performance, that is, whether the police detained defendant as soon as practicable after departing from his residence. Of course, this performance-based duty will normally, but not necessarily, result in detention of an individual in close proximity to his residence.
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> The initial detention of the police was proper in light of *Summers*. The record does not indicate exactly how far defendant had travelled before being stopped. The record does indicate that the address of defendant's residence was 6316 Aspen Ridge Boulevard. At the time of his detention, defendant was travelling southbound on Aspen Ridge Boulevard and the police stopped him "almost immediately after exiting his residence." Other testimony indicates that defendant was stopped "a very short distance" from his residence, and the court found that defendant was stopped "a short distance" from his residence. We do not find the actions of the police improper in light of the short distance travelled by defendant. Further, the facts and evidence do not suggest that the police attempted to manipulate the circumstances in order to search defendant's car. Indeed, it was defendant's acts, not those of the police, that led to the search of the automobile. [*Cochran, supra* at 339 (citations and footnote omitted).]

The detention of defendant in this case was similarly justified under *Summers* and *Cochran*. Although the police waited until defendant returned to the residence to execute the search warrant[1] and then stopped him approximately twenty yards from the residence, the circumstances do not suggest that the police manipulated the situation in order to search defendant. During the time defendant was gone, another occupant of the house, Shaniqua Broom, frequently came to the doorway and looked outside. It was reasonable for the officers to believe from Broom's conduct that defendant was expected to return shortly. For the officers' safety, it was not unreasonable for them to wait until defendant returned and then detain him instead of risking beginning the search and having defendant return while many of the officers were inside conducting the search. The facts do not demonstrate a bad-faith effort by the police to manipulate the circumstances surrounding the search of the residence to include defendant, who was a target of the search warrant, although he was identified only by a nickname. Under

[1] Defendant had been seen by a surveillance officer leaving the residence in a vehicle about one hour before execution of the warrant.

Summers and *Cochran*, the police were justified in detaining defendant and removing him from his vehicle while conducting the search, regardless of whether he had engaged in or was about to engage in criminal activity.

We find no merit to defendant's argument that he was initially arrested, not detained, by the police. In *People v Zuccarini*, 172 Mich App 11, 13-15; 431 NW2d 446 (1988), this Court found that the defendant was only detained under *Summers*, not arrested, when, for safety reasons, he was handcuffed outside a house that was being searched after the officer handcuffing him thought she heard a lot of people running inside the house. A search for narcotics may give rise to sudden violence, and minimizing the risk of harm to the police and the occupants by exercising unquestionable command over the situation is a legitimate interest that must be considered when evaluating if a detention is justified. *Id*. at 14. In this case, the facts show that defendant was initially detained by the police. He was not arrested until an officer observed cocaine in his coat pocket. Accordingly, the police did not need to justify the initial stop of defendant with probable cause.

Once defendant was detained under *Summers*, the police properly could check defendant for weapons under *Terry v Ohio*, 392 US 1, 16; 88 S Ct 1868; 20 L Ed 2d 889 (1968), for the safety of the officers involved in conducting the raid. Under *Terry*, the police may conduct "a limited patdown search for weapons if the officer has a reasonable suspicion that the individual is armed, and thus poses a danger to the officer or to other persons." *People v Custer*, 465 Mich 319, 328; 630 NW2d 870 (2001). In this case, the police had information that defendant had committed violent crimes in the past with firearms and that he carried a firearm. The police were justified in ordering defendant to exit the vehicle to determine if he possessed a weapon.

Once defendant was ordered out of the vehicle, an officer observed a plastic bag containing an off-white substance that appeared to be cocaine. That substance was properly seized under the plain-view exception. *People v Champion*, 452 Mich 92, 101-103; 549 NW2d 849 (1996). For these reasons, the trial court did not err in denying defendant's motion to suppress.

Next, defendant argues that the evidence was insufficient to support his convictions for one count of possession with intent to deliver cocaine and the remaining weapons convictions because the prosecution failed to prove that he possessed either the cocaine or the firearm found inside the Karen Court residence. We disagree.

An appellate court's review of the sufficiency of the evidence to sustain a conviction should not turn on whether there was any evidence to support the conviction, but whether there was sufficient evidence to justify a rational trier of fact in finding the defendant guilty beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 513-514; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992). The evidence must be viewed in the light most favorable to the prosecution. *Id*. at 515.

Possession of a controlled substance can be either actual or constructive. As explained in *People v Hardiman*, 466 Mich 417, 421; 646 NW2d 158 (2002):

> A person need not have actual physical possession of a controlled substance to be guilty of possessing it. Possession may be either actual or

> constructive. Likewise, possession may be found even when the defendant is not the owner of recovered narcotics. Moreover, possession may be joint, with more than one person actually or constructively possessing a controlled substance.
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> The courts have frequently addressed the concept of constructive possession and the link between a defendant and narcotics that must be shown to establish constructive possession. It is well established that a person's presence, by itself, at a location where drugs are found is insufficient to prove constructive possession. Instead, some additional connection between the defendant and the contraband must be shown. [Citation, quotation marks, and footnote omitted.]

Constructive possession exists when the defendant has the right to exercise control over the controlled substance and has knowledge of its presence. *Wolfe, supra* at 520. Possession may be shown by circumstantial evidence and reasonable inferences drawn from the evidence. *People v Meshell,* 265 Mich App 616, 622; 696 NW2d 754 (2005).

Circumstantial evidence showed that defendant was living at the Karen Court residence. Letters written to defendant at another address were found at the Karen Court residence. In addition, clothing that was consistent with defendant's size was found in a bedroom closet and also on the floor on the side of a bed. The jury could also conclude that a spiral notebook with defendant's nickname on it and other items located near it, such as a box of sandwich bags with a pair of scissors, belonged to defendant. Items connected to defendant were also found near a bottle of Mannitol and a shoebox that had cocaine residue. Viewed in the light most favorable to the prosecution, the evidence was sufficient to enable the jury to conclude that defendant had dominion and control over the premises and constructively possessed the cocaine that was seized from the residence.

The evidence was also sufficient to establish that defendant possessed the firearm that was seized from the residence. A defendant may have constructive possession of a firearm if the location of the weapon is known to the defendant and reasonably accessible to him. Physical possession is not necessary if the defendant has constructive possession. *People v Burgenmeyer,* 461 Mich 431, 438; 606 NW2d 645 (2000). In this case, a firearm was found underneath a bedroom mattress. Men's clothing was found on the floor on one side of the bed and women's clothing on the floor on the other side of the bed. The gun was found under the mattress on the side with the men's clothing. This evidence was sufficient to support an inference that defendant was aware of the location of the firearm and had access to it and, therefore, constructively possessed the firearm.

A person is guilty of felony-firearm if the person possesses a firearm during the commission of a felony. *Id.* at 436. The inquiry must focus on whether the defendant possessed the firearm at the time he committed the felony, not if he was in possession of the firearm at the time the police searched the residence. *Id*. at 439.

The prosecution's theory was that defendant was guilty of two counts of felony-firearm, one count for possessing a firearm while possessing with intent to deliver between 50 and 450 grams of cocaine and one count for possessing a firearm while being a felon in possession of a firearm.

"A drug-possession offense can take place over an extended period, during which an offender is variously in proximity to the firearm and at a distance from it." *Id.* at 439. In *Burgenmeyer, supra* at 439-440, the Supreme Court held that there was sufficient evidence to convict the defendant of felony-firearm when cocaine was found in a dresser drawer in a bedroom and the firearms were on top of the dresser. The drugs and weapons were close enough for the jury to reasonably infer that both were possessed by the defendant at the same time. *Id*. at 440.

In this case, the firearm was found in close proximity to defendant's belongings, including items used to prepare cocaine for delivery. The evidence was sufficient to enable the jury to find that defendant possessed the firearm while preparing the cocaine for delivery. *Id.* at 439-440. Further, defendant also properly could be convicted of felony-firearm based on his status as a convicted felon not eligible to possess a firearm. MCL 750.224f; *People v Dillard,* 246 Mich App 163, 167-168; 631 NW2d 755 (2001). Defendant stipulated that he had a prior felony conviction and was not allowed to possess a firearm.

Accordingly, there was sufficient evidence to support defendant's convictions.

Defendant also argues that the results of field tests performed on the suspected cocaine in court were improperly admitted to establish that the substances contained cocaine. Defendant concedes that he did not object to this evidence at trial. Therefore, appellate relief is foreclosed absent a plain error affecting defendant's substantial rights. *People v Carines,* 460 Mich 750, 761-767; 597 NW2d 130 (1999).

The police seized a quantity of suspected cocaine from defendant's person and a quantity of suspected cocaine from inside the Karen Court residence. Only the former quantity was tested by a laboratory. The laboratory testing revealed that the substance contained cocaine. During trial, the prosecutor asked the officer in charge to perform field tests on each of the substances in court, using the Cobalt Thiocyanate test. The officer characterized this type of test as a preliminary test and testified that he was trained to perform field tests on suspected narcotics. All samples that were tested in court were positive for the presence of cocaine.

Defendant now argues that the results of the field tests conducted in court were erroneously admitted because the Cobalt Thiocyanate test is only a "presumptive" test and can indicate the presence of other narcotics besides cocaine. He further argues that the jury should have been instructed on the limitations of this type of test.

Defendant relies on *People v Velasquez,* 125 Mich App 1, 4; 335 NW2d 705 (1983), which refers to the limited nature of the Cobalt Thiocyanate test, and an unpublished Tennessee case, *State v Roberts*, 2004 WL 2715316 (Tenn Crim App), in support of his arguments. Neither of these decisions addresses the admissibility of Cobalt Thiocyanate test results.

Although the Cobalt Thiocyanate test may not be dispositive of whether a substance is actually cocaine, defendant has not established any basis in the record for concluding that the substances analyzed in this case were inaccurately classified as containing cocaine. Moreover, the officer in charge explained how the test is conducted, performed the testing in court, and characterized this type of test as preliminary only. Defendant has not met his burden of showing that admission of the test results constituted plain error affecting his substantial rights.

Next, we reject defendant's argument that he is entitled to a new trial because of misconduct by the prosecutor. The test for prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *People v Bahoda*, 448 Mich 261, 266-267; 531 NW2d 659 (1995). However, because defendant did not object to any of the challenged conduct at trial, our review is limited to determining whether a plain error occurred that affected defendant's substantial rights. *Carines, supra*; *People v McLaughlin*, 258 Mich App 635, 645; 672 NW2d 860 (2003).

Even though there was no direct testimony that Broom was defendant's girlfriend, it was not improper for the prosecutor to argue that the jury could infer from the evidence that defendant was having a relationship with Broom and shared a bedroom with her in the Karen Court residence. There was evidence that defendant and Broom socialized and that both men's and women's clothing were found inside the bedroom, on the floor on each side of the bed. The prosecutor's arguments constituted proper commentary on the evidence and reasonable inferences arising therefrom. *Bahoda*, *supra* at 282; *People v Ullah*, 216 Mich App 669, 678; 550 NW2d 568 (1996).

Defendant also argues that the prosecutor committed misconduct by failing to present evidence at trial that a tote bag that was found in a closet and that contained cocaine also contained documents belonging to Broom. Although defendant asserts that the prosecutor "sat" on this evidence, he acknowledges that his first attorney was aware of this evidence at the time of the preliminary examination. Because there is no basis for concluding that the prosecutor hid this evidence, and nothing to support defendant's claim that this evidence was suppressed or not shared with the defense, defendant has not demonstrated a plain error.

Defendant further argues that the prosecutor improperly offered the results of the field tests on the suspected cocaine that were conducted in court. Prosecutorial misconduct may not be predicated on good-faith efforts to admit evidence. *People v Noble*, 238 Mich App 647, 660; 608 NW2d 123 (1999). The prosecutor is entitled to attempt to introduce evidence that he legitimately believes will be accepted by the trial court, as long as the attempt does not prejudice the defendant. *Id*. at 660-661. Consistent with our earlier conclusion that defendant has not demonstrated that admission of the field test results was plain error affecting his substantial rights, we likewise find no basis for concluding that the prosecutor engaged in misconduct by offering the test results at trial.

Next, defendant argues that trial counsel was ineffective. Because defendant did not raise this issue in a proper motion for a new trial or evidentiary hearing in the trial court, and because this Court rejected defendant's earlier motion to remand for an evidentiary hearing, our review is limited to errors apparent from the record. *People v Matuszak*, 263 Mich App 42, 48; 687 NW2d 342 (2004). To establish ineffective assistance of counsel, defendant must show that counsel's performance fell below an objective standard of reasonableness and that the representation so prejudiced defendant that he was denied his right to a fair trial. *People v Pickens*, 446 Mich 298, 338; 521 NW2d 797 (1994). Defendant must overcome the presumption that the challenged action might be considered sound trial strategy. *People v Tommolino*, 187 Mich App 14, 17; 466 NW2d 315 (1991). To establish prejudice, defendant must show that there is a reasonable probability that, but for his counsel's error or errors, the result of the proceedings would have been different. *People v Johnnie Johnson, Jr*, 451 Mich 115, 124; 545 NW2d 637 (1996). The

burden is on the defendant to establish factual support for his claim of ineffective assistance of counsel. *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999).

Defendant first argues that trial counsel was unprepared for both trial and the evidentiary hearing on his motion to suppress evidence because he failed to explore relevant matters that were raised at the preliminary examination. Although defense counsel did not explore at the evidentiary hearing or trial certain matters that were raised at the preliminary examination, this was a matter of trial strategy and defendant has not overcome the strong presumption that counsel exercised sound strategy. *People v Marcus Davis*, 250 Mich App 357, 368; 649 NW2d 94 (2002). In the absence of testimony from defense counsel explaining the reasons for his decisions, we cannot conclude that defense counsel was ineffective. *People v Rockey*, 237 Mich App 74, 77; 601 NW2d 887 (1999). Moreover, defendant has not demonstrated that there is a reasonable probability that the result of the proceedings would have been different had the matters in question been raised or explored below.

Although defense counsel was late arriving for the first day of trial, there is no indication that this had any bearing on his preparedness for trial.

Defendant further argues that counsel was ineffective for failing to timely and properly challenge the jury array. Even if counsel was deficient in his handling of this issue, there is no basis in the record for concluding that the jury venire was not drawn from a fair cross section of the community. *People v McKinney*, 258 Mich App 157, 161-162; 670 NW2d 254 (2003). Thus, defendant has not shown that he was prejudiced by counsel's alleged error.

Defendant also argues that his attorney failed to properly challenge the sufficiency of the search warrant affidavit. Defendant concedes, however, that the affidavit was sufficient. He explains that he raises this argument only to show that counsel did not comprehend all the rules of criminal procedure. Because defendant concedes that he was not prejudiced by counsel's alleged error, he cannot establish a claim of ineffective assistance of counsel on this basis.

Defendant also argues that counsel was ineffective for asking questions that elicited unfavorable testimony. Defendant was not prejudiced by counsel's questioning that led to the revelation that defendant was wearing expensive footwear, given the officer's testimony that drug dealers wear all types of clothing, both expensive and inexpensive. Further, we find no basis in the record for concluding that the testimony about a scale in defendant's possession affected the outcome of the case. Similarly, defendant does not explain how he was prejudiced by the trial court's refusal to allow a blown-up version of the search warrant to be displayed during defense counsel's closing argument when the warrant was never offered into evidence.

Defendant also argues that counsel was ineffective for not objecting to the admission of the field test results and for not requesting an instruction regarding the limited nature of this type of test. As previously mentioned, defendant has not shown that the use of this test led to inaccurate results. Additionally, the officer characterized the type of test used as preliminary only. Accordingly, defendant has not shown that he was prejudiced by counsel's inaction.

Although defense counsel failed to provide a theory of the case to be read with the jury instructions, the prosecution also did not have its theory of the case read to the jury. Because

neither party had its respective theory of the case read to the jury, defendant has not shown that he was prejudiced in this regard.

Defendant further argues that certain evidence, including the testimony of codefendant Broom and defendant's parole officer, was discussed in defendant's opening statement, but was never offered. Because it is not apparent from the record why this evidence was not offered, there is no basis for concluding that counsel was ineffective for not presenting it.

Defendant also claims that his attorney's hearing problem affected his performance. Although the record establishes that counsel required the use of a hearing aid and sometimes had problems hearing, the record discloses that the trial court had the participants speak louder, repeat statements, or correct defense counsel if he misunderstood something that was said. There is no indication that counsel's hearing problems affected his performance in a manner that was prejudicial to defendant.

We reject defendant's claim that he was denied the effective assistance of counsel.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Jane E. Markey
/s/ Patrick M. Meter